UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GEORGE MUNSON,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 89-0193 B***
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant	)	

PROPOSED FINDINGS OF FACT AND RECOMMENDED DECISION ON MOTION TO VACATE DEFENDANT-PETITIONER'S SENTENCE AND CONVICTION

Petitioner George Munson, serving a 25-year sentence for drug-related offenses, moves pursuant to 28 U.S.C. ' 2255 to vacate his sentence and conviction on the ground of violation of his Sixth Amendment right to effective assistance of counsel. Munson claims that the performance of trial counsel Charles J. Rogers, Jr. was constitutionally deficient in several respects. By order dated April 12, 1990 this court (Cyr, J.) summarily dismissed all claims but that relating to Rogers' failure to call witnesses David Bennett and Kenneth (``Kenny") Dooley in defense of charges contained in Count IV of the Second Superseding Indictment against Munson. An evidentiary hearing on the remaining claim was held before Magistrate Judge Edward H. Keith in Bangor on February 11, 1991[1]; the final

[1] Bennett did not testify at the evidentiary hearing; however, the parties stipulated that, had he testified, his testimony would have been identical to the statements made in his affidavit (attached as Exhibit C to Motion to Vacate Defendant-Petitioner's Sentence and Conviction). Transcript of Hearing on Plaintiff's Motion to Vacate Sentence and Conviction at 74.

legal memorandum in this matter was filed on June 7, 1991. After scrutinizing the record and the parties' legal arguments, I now recommend that this court grant the petitioner's motion to vacate his sentence and conviction with respect to Count IV.

I. PROPOSED FINDINGS OF FACT

A jury convicted George Munson on July 1, 1986 in this court on all six counts of a Second Superseding Indictment charging violations of 18 U.S.C. ' 2 and 21 U.S.C. '' 841(a)(1), 843(b) and 846. Count IV, premised on the alleged swap of cocaine for a Corvette, charged illegal distribution of three-and-a-half ounces of cocaine in May 1983 in violation of 18 U.S.C. ' 2 and 21 U.S.C. ' 841(a)(1). Munson was represented at trial by Charles J. Rogers, Jr., an experienced criminal-defense attorney. William Christiansen, a government informant, testified at trial that he had served as a courier for a transaction in which Munson weighed out and gave him three-and-a-half ounces of cocaine in exchange for a Corvette owned by a third person, Bobby Stewart. Christiansen testified that he then gave the cocaine to Pat Berry, a middleman who conveyed it to the Corvette's owner. Rogers presented no evidence in defense of that charge, choosing to focus on attacking the credibility of Christiansen, a self-professed former drug dealer and addict.[2] Munson now asserts that he informed Rogers before trial that two witnesses were available to testify that Munson paid cash for the Corvette. Both witnesses, Kenny Dooley and David Bennett, would have testified that they were present during the transaction in question and saw Munson pay cash for the automobile. Bennett would have

[2] During Munson's five-day trial Rogers did call two witnesses, an expert witness on cocaine testing and Jacqueline Munson, the petitioner's wife. Rogers attempted to elicit Jacqueline Munson's testimony as to her husband's method of payment for the Corvette; however, the trial judge sustained the prosecution's objection to the question. The petitioner did not testify.

testified, in addition, that Norman Grenier, a drug dealer and friend of both Bennett and Munson, exchanged cocaine for the Corvette about a week before selling the automobile to Munson for cash.

A. David Bennett

At the evidentiary hearing held before Judge Keith, Rogers claimed that he and Munson had agreed that one witness, David Bennett, should not be called as a matter of trial strategy and that, in any event, Rogers felt as a matter of independent professional judgment that Bennett should not take the stand. I am persuaded that, if in fact there was an agreement between Munson and Rogers as to Bennett, they agreed to use him as a witness. Munson testified that he understood that Rogers was going to subpoena Bennett and Dooley for the trial and that Rogers never informed him Bennett would not be called to take the stand. During the trial he did not question why Bennett was not being called because Rogers repeatedly reassured him ``not to worry" and because he knew nothing of courtroom procedures. Bennett likewise contended that he discussed his testimony with Rogers and that Rogers asked him to testify at trial. He averred that he attended the five-day trial because he expected to be called as a witness. Munson corroborated this expectation, testifying that Bennett told him during the trial, ``My subpoena never showed up, so I came here [to court]."[3] Transcript of Hearing on Plaintiff's Motion to Vacate Sentence and Conviction (``Transcript") at 69.

[3] I take this statement into consideration for its value in corroborating Bennett's account, not for the truth of the matter asserted therein.

Both Rogers and Munson were self-interested witnesses at the evidentiary hearing, with Munson seeking to reverse his conviction on Count IV and Rogers protecting his general reputation as a lawyer. However, Rogers' testimony was evasive. Under questioning, Rogers first denied that Bennett provided exculpatory information and then stated that, although he could not recall exactly, he still believed Bennett did not provide exculpatory information. Finally, when confronted with his own affidavit,[4] Rogers admitted that Bennett had provided him with exculpatory information. Bennett, a friend of Munson's, was not an entirely disinterested witness. However, I find it difficult to believe Bennett would have travelled voluntarily from Rhode Island to Maine to sit through a five-day trial unless he thought his presence would serve some important purpose.[5] Under these circumstances, I cannot credit Rogers' contention that he informed Bennett after their interview that his testimony would not be used. Common sense, as well, weighs in favor of the finding that Rogers and Munson agreed to use Bennett if in fact they reached any understanding at all. Assuming *arguendo* that Rogers had no knowledge of Dooley, as he claimed, Bennett would have been Munson's only rebuttal witness to the charges contained in Count IV. If Munson did consult with Rogers regarding trial strategy, it is unlikely that he would have agreed to forgo his only defense to the count.

Rogers asserted four reasons, aside from the agreement, for the decision not to call Bennett as a defense witness: (1) that Bennett's testimony would have placed Munson in the proximity of drug deals, a strategy Rogers wished to avoid, (2) that Bennett appeared to be under the influence of drugs during the trial, (3) that Bennett had a prior conviction for manslaughter and (4) that Bennett would have committed perjury. The record makes clear that Bennett's testimony could indeed have

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[4] Rogers averred that ``Mr. Bennett would have testified that Norman Grenier (deceased) bought the vehicle for cocaine." Affidavit of Counsel Charles J. Rogers, Jr. at 2.

[5] Rogers conceded at the evidentiary hearing that Bennett was present during the trial.

associated Munson with drugs -- though as a user, not a dealer -- and that Rogers' strategy was to attack the credibility of the prosecution's witnesses. Rogers no doubt sincerely believed Bennett was under the influence of drugs, although Munson testified that Bennett appeared sober during the trial. No one disputes that Bennett had a conviction for manslaughter, although Rogers testified that he did not check the details of the conviction.

Rogers' judgment as to the likelihood of perjury appears not to have been based on fact or investigation but rather on Rogers' subjective belief that his client was guilty as charged. Munson stated at the evidentiary hearing that he told Rogers the automobile purchase was made with cash and explained that the money derived from a house sale and a settlement with a railroad. Rogers' evasive testimony as to the source of his belief permits the strong inference that it was based on bias or intuition rather than fact. Rogers testified, for example, at the evidentiary hearing, ``I'm not saying that [Munson could not tell me where the cash came from]. What he [Munson] told me and what is truthful and what is feasible are another thing, you see."[6] Transcript at 34.

B. Kenny Dooley

[6] In the same vein, Rogers stated, ``There was mention [by Munson] of $8,000 in cash, which also presented a problem for George because I don't think there are that many people who have $8,000 in cash in their house to go buy a car with, and George and I discussed that. And George had had an injury. He was working for a railroad and he had made a settlement . . . and . . . it was rather obvious to me that, because I had been an insurance adjustor [sic], insurance companies pay by check. And if he had this $8,000 in cash, it would have to be -- he would have to show where the money came from . . . ." Transcript at 33.

Munson testified that he informed Rogers of Dooley; Rogers denied it, averring that he had never met or heard of Dooley. Both Munson and Dooley agreed that Rogers never actually met Dooley despite attempts on Dooley's part to meet with Rogers. I am persuaded that Munson did inform Rogers of Dooley's willingness to provide exculpatory testimony. At one point in his testimony, Rogers hesitated when asked if Munson informed him of any other witnesses besides Bennett, saying, ``No, no, he -- he may have, but I doubt it." Transcript at 51. I find it highly unlikely that Munson would have informed Rogers of the existence of one but not both witnesses available to provide exculpatory evidence as to Count IV. Dooley testified that he spoke to Munson about the possibility of testifying and that he attempted to reach Rogers -- speaking to Rogers' secretary, leaving messages on Rogers' answering machine and once travelling to Rogers' office with Munson in an unsuccessful attempt to find Rogers. The likelihood therefore is great -- and I propose that this court find as a fact -- that Rogers had adequate notice of Dooley's existence and the substance of the testimony Dooley would have presented.

II. LEGAL ANALYSIS

A criminal defendant's Sixth Amendment ```right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citation omitted). To be constitutionally ineffective, a defense attorney's performance must not only be deficient but also so prejudicial as to undermine confidence in the justness of the trial's result. *Id.* at 687, 694. A criminal-defense attorney's trial representation is to be judged deferentially and with ``every effort . . . made to eliminate the distorting effects of hindsight . . . ." *Id.* at 689. Nonetheless, on the facts as I propose this court find them, the petitioner succeeds in proving both that Charles Rogers' performance was

deficient under the circumstances and that it undermined confidence in the outcome of his trial with respect to Count IV.

A. Deficiency of Performance

A court reviewing criminal-defense counsel's performance ``must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action `might be considered sound trial strategy.'" *Id.* (citation omitted). While the court must presume adequate performance, it ``should keep in mind that counsel's function . . . is to make the adversarial testing process work in the particular case." *Id.* at 690. ``The Constitution does not guarantee a defendant a letter-perfect defense or a successful defense; rather, the performance standard is that of reasonably effective assistance under the circumstances then obtaining." *United States v. Natanel*, No. 89-1953, slip op. at 13 (1st Cir. July 9, 1991) (citation omitted).

Strickland clearly admonishes courts reviewing the effectiveness of counsel's performance to resist the temptation to engage in Monday-morning quarterbacking. The range of strategic choices to which courts must defer is wide; a finding that counsel has strayed from that variegated terrain should be made most circumspectly. Nonetheless, on the facts as I have proposed the court find them, the petitioner herein has overcome the *Strickland* presumption. Rogers' actions and omissions with respect to Bennett and Dooley were not the product of reasoned strategic choices -- wise or unwise -- of the type to which a reviewing court should defer. Rogers offered four distinct rationales for his treatment of Bennett at trial -- all of which, upon close inspection, lead me to conclude that they are pretextual.

Three of Rogers' reasons are interrelated: that Bennett's testimony would have placed Munson in the proximity of drug deals, that Rogers believed Bennett was under the influence of drugs during the trial and that Bennett had a prior conviction for manslaughter. Collectively, these rationales signal a concern that the potential value of Bennett's testimony as to Count IV -- alleging one instance of distribution of cocaine -- was outweighed by its potential harm as to the remaining five counts, alleging separate instances of distribution of cocaine, conspiracy to distribute cocaine and illegal use of a telephone to facilitate cocaine distribution. It is difficult to see how Rogers honestly could have made such an assessment. The case against his client on the remaining counts was overwhelming. A parade of witnesses had associated Munson with drug dealing; Munson had been videotaped and audiotaped in the vicinity of drug dealings by undercover government agents; and Munson's fingerprints had been identified on a bag of cocaine carried by an alleged co-conspirator. Bennett's additional testimony -- that Munson was a user but not a dealer -- could not realistically have magnified the damage. Bennett, an associate of drug dealers, was not an ideal witness. His manner, appearance (possibly bespeaking use of drugs) and prior criminal record could have undermined his credibility. However, a number of the prosecution's witnesses, including chief witness William Christiansen, were or had been unsavory characters whose credibility Rogers vigorously assailed.

Looking to the other side of the equation, Munson clearly stood to gain from the presentation of Bennett's testimony. Count IV comprised the weakest link in the prosecution's case. The Christiansen home was not yet under police surveillance at the time of the alleged swap. The two prosecution witnesses who claimed to have been eyewitnesses to the Corvette-for-cocaine swap told conflicting stories. Christiansen testified that he had seen the petitioner measure out the cocaine used in the swap and give it to middleman Pat Berry; however, Pat Berry testified that he received the

cocaine directly from Norman Grenier in exchange for the car. The omitted testimony of Bennett and Dooley would have corroborated and greatly strengthened Berry's version of the story.

Had Rogers been able to present a more credible witness, he justifiably could have culled Bennett from the defense. A desire to avoid presentation of adverse testimony normally would be beyond reproach -- but not under these circumstances. Rogers owed it to his client to allow the jury to assess Bennett's credibility rather than to prejudge the credibility of his only available defense witness himself. *Cf. United States v. Walters*, 904 F.2d 765, 772 (1st Cir. 1990) (failure of trial counsel to cross-examine vigorously or to object based on reasonable decision to avoid emphasis of adverse evidence); *Shraiar v. United States*, 736 F.2d 817, 818 (1st Cir. 1984) (omitted testimony would not have been exculpatory); *Baranow v. United States*, 703 F. Supp. 134, 136 (D. Me. 1988), *aff'd*, 915 F.2d 1557 (1st Cir. 1990) (same).

Rogers' contention that he kept Bennett from the stand because he feared Bennett would have committed perjury also proves upon close examination to be devoid of substance. Assuming *arguendo* that Rogers did subjectively disbelieve Bennett's account, his belief does not appear to have been reasonable. As the Supreme Court explained in *Strickland*:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland, 466 U.S. at 690-691. Rogers neither undertook a reasonable investigation of the likelihood of perjury nor made a reasonable professional judgment that obviated the need to investigate. He simply chose not to believe his client's story and hence not to credit Bennett's. Rogers could ill afford to take Bennett so lightly. Bennett offered a reasonable hope of successful rebuttal of the charges contained in Count IV. Under the circumstances, Rogers had a duty to investigate Munson's explanations for the sources of the cash used in the Corvette transaction, at least by cursory examination of records (if any) verifying those sources.

Secondly, Rogers' actions during trial belie his late-found concern that his client's defense was the product of perjury. Rogers informed the judge at the close of the third day of trial that he intended to put ``Bennett'' on the stand. During the fourth day of trial Rogers unsuccessfully tried to elicit the testimony that Munson paid for the Corvette in cash from the petitioner's wife. The petitioner's wife, whom Rogers deemed credible and who by all accounts was not involved in cocaine use or trafficking, did testify that Munson had large cash settlements from the sale of a home incident to a divorce and a railroad settlement, the same sources for the cash that Munson had earlier described to Rogers.

Rogers likewise failed in his duty to investigate the possibility of using Dooley as a defense witness. Rogers was put on notice of Dooley's existence and the substance of his proffered testimony. At a minimum, he should have met with Dooley to make a reasoned judgment whether Munson's defense would have been strengthened by using one or both available eyewitnesses. Rogers' brushoff of Dooley hardly can be categorized as a strategic decision to which deference is due.

B. Prejudice to Defense

A criminal defendant who proves that counsel's performance was deficient next must demonstrate that his lawyer's flaws likely prejudiced his defense. ``It is not enough for the defendant

to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, ``[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. ``A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Given Munson's lack of defense at trial to the charges contained in Count IV, the exculpatory value of Bennett's and Dooley's testimony, the testimony of government witness Pat Berry and the vulnerability of prosecution witness Christiansen to impeachment, I find a reasonable probability that the presentation of one or both of these witnesses would have changed the outcome of Munson's trial as to Count IV. Even had the jury believed that Munson's cash derived from drug sales, as Rogers feared they might, that should have been irrelevant to the precise charge underlying Count IV: distribution of cocaine in exchange for the Corvette.

III. CONCLUSION

For the foregoing reasons, I recommend that this court ***GRANT*** the instant petition with respect to Count IV of the Second Superseding Indictment, vacating the petitioner's conviction and sentence with respect to that count.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 16th day of August, 1991.

David M. Cohen
United States Magistrate Judge